Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

ANDREW TATE, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT, U.S.

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QUESTIONS PRESENTED

Whether a fact necessary for an increase in offense level under the United States Sentencing Guidelines must be alleged and proved according to the requirements of the Sixth Amendment as set forth in *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Andrew Tate, Jr., respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth rendered in this case on May 29, 2002.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is found at *United States v. Tate*, No. 02-50616 (9th Cir. May 27, 2004) (unpublished). The opinion is reproduced herein as Appendix A. The Judgment and Probation/Commitment Order by the United States District Court, Central District of California, is reproduced herein as Appendix B.

The opinion of the United States Court of Appeals for the Ninth Circuit affirming the district court's judgment was entered on May 27, 2004. The question presented to the Ninth Circuit was whether the evidence was sufficient to support an increase in the applicable range of penalties based on judicial fact finding. Shortly after the Ninth Circuit's decision affirming the trial court, this court issued the opinion of *Blakely v. Washington*, 2004 WL 1402697 (June 24, 2004). *Blakely* appears to have invalidated the provisions of the United States Sentencing Guidelines which permit judicial fact finding to increase a sentence. This Court's jurisdiction in invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND SENTENCING GUIDELINE PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury if the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense." U.S. Cont. amend VI.

United States Sentencing Guideline §2K2.1(b)(1)(A).

STATEMENT

On February 5, 2002, petitioner was charged in a one count indictment with being a felon in possession of three (3) firearms in violation of 18 U.S.C. §922(g).

On August 5, 2002, petitioner pled guilty pursuant to a written plea agreement. Petitioner admitted that he possessed two (2) of the three guns alleged in the indictment.

The presentence report recommended a two-level increase in petitioner's offense based upon the fact that five (5) guns were found in petitioner's co-defendant's home. The presentence report cited United States Sentencing Guideline §2K2.1(b)(1)(A), which creates sentencing enhancements based upon the number of firearms possessed.

The defense objected to the presentence report based upon the grounds that the facts were insufficient to support a finding that petitioner possessed more than two (2) firearms. At sentencing, after a hearing, the court found that petitioner possessed five (5) firearms, and sentenced him accordingly.

The petitioner appealed to the United States Court of Appeals for the Ninth Circuit, contending that the evidence was insufficient to support the trial judge's findings.

On May 27, 2004, the Ninth Circuit ruled that the hearsay evidence was sufficient to support the judge's findings by a preponderance of evidence. On June 18, 2004, the Ninth Circuit issued the mandate affirming the judgment of the district court.

On July 9, 2004, petitioner filed a motion with the Ninth Circuit to recall the mandate and allow petitioner to file a late petition for rehearing based upon *Blakely*. Petitioner submitted a petition for rehearing concurrently with the motion. On August 18, 2004, the Ninth Circuit denied the motion and petition, the Order is attached herein as Appendix C. This decision was received by petitioner on August 23, 2004.

This petition follows.

REASONS THE WRIT SHOULD ISSUE

In *Blakely v. Washington*, 2004WL 1402697 (June 24, 2004) this Court concluded that the upward adjustments of a Washington state sentencing scheme violated the constitutional rule of *Apprendi v. New Jersey*, 530 U.S. 466, 490

(2000) -- "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." The Blakely decision clarified that, for *Apprendi* purposes, the term "statutory maximum" means "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely*, 2004WL 1402697 at *4.

Although the issue of the constitutionality of the Federal Sentencing Guidelines was not before the Court, the ramifications of the Federal Sentencing Guidelines (hereafter "Guidelines") were obvious. In dissent, Justice O'Connor noted that the "practical consequences for trial courts, starting today, will be equally unsettling: How are courts to mete out guidelines sentences? Do courts apply the guidelines as to mitigating factors, but not as to aggravating factors? Do they jettison the guidelines altogether? 2004 WL 1402697 at *15 (O'Connor, J., dissenting). Because of this uncertainty, Justice Breyer advocated a departure from this Court's usual practice, stating:

> Ordinarily, this Court simply waits for cases to arise in which it can answer such questions. But this case affects tens of thousands of criminal prosecutions. Federal prosecutors will proceed with those prosecutions subject to the risk that all defendants in those cases will have to be sentenced, perhaps tried, anew. Given this consequence and the need for certainty, I would not proceed further

> piecemeal; rather, I would call for further argument on the ramifications of the concerns I have raised.

2004 WL 1402697 at *24 (Breyer, J., dissenting).

There is considerable confusion in the lower courts. Some courts have already declared the Guidelines unconstitutional in their entirety. Other courts are applying base offense levels but disregarding sentence enhancement provisions. Another Court has decided that *Blakely* does not apply to the Guidelines. Still others are in the process of determining how to proceed. All, however, acknowledge the constitutional uncertainty surrounding the Guidelines. This is an issue which can only be resolved by this Court, and it should be resolved soon.

There is no doubt that the Ninth Circuit's decision in petitioner's case conflicts with *Blakely* opinion. Moreover, in the recent decision of *United States v. Ameline*, No. 02-30326 9th Cir. (July 21, 2004), the Ninth Circuit held *sua sponte* that "the district court's finding by a preponderance of the evidence of 1,603.60 grams of methamphetamine- despite Ameline's admission of only a detectable amount of methamphetamine violates Ameline's Sixth Amendment right to a jury trial." Thus, the Ninth Circuit now holds that the *Blakely* rule does apply to the Guidelines. Petitioner's case involved the same type of judicial fact finding as in *Ameline*.

Petitioner should be able to get the benefit of *Blakely*. The defendant objected to the trial court's applications of §2K2.1(b)(1)(A) to enhance his sentence. At the time of

sentencing, *Blakely* had not been decided. *Blakely* was decided after the Ninth Circuit's decision became final, but before the time expired for a petition for *certiorari.*

At the present time, petitioner has no other remedy for the constitutional violation except through this court granting this petition, and remanding the case to the Ninth Circuit to consider the matter in light of *Blakely.*

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Dated: August 25, 2004.

Respectfully submitted,
LAW OFFICES OF RAMSEY & PRICE

ROBERT RAMSEY, JR.

Attorney for Petitioner
ANDREW TATE, JR.

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
May 27, 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
ANDREW TATE,
Defendant - Appellant.

No. 02-50616
D.C. No. CR-02-00123-SVW

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Stephen V. Wilson, District Judge, Presiding

Argued and Submitted May 10, 2004
Pasadena, California

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Before: BROWNING, RYMER, and GRABER,
Circuit Judges.

Andrew Tate was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g), and was sentenced to a term of imprisonment of 110 months and a 3-year term of supervised release. Tate appeals the district court's denial of his motion to suppress evidence and the two-level sentence enhancement for possessing three additional firearms.

Denials of motions to suppress are reviewed de novo. *United States v. Percy*, 250 F.3d 720, 725 (9th Cir. 2001). The district court's factual findings with regard to the motion to suppress are reviewed for clear error. *Id.* Factual findings in the sentencing phase are also reviewed for clear error. *United States v. Caperna*, 251 F.3d 827, 830 (9th Cir. 2001).

DISCUSSION

I. Suppression of Firearms

At trial, Tate moved to suppress the five firearms found at the house he shared with Misty McCoy. He argues on appeal that because the seizure of the firearms exceeded the scope of the search warrant, the firearms evidence should have been suppressed at trial.

Under the plain view exception to the warrant requirement, officers may seize an object without a warrant if they are lawfully in a position from which to view the object, if its incriminating nature is immediately apparent, and if the officers have a lawful right of access to the object. *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993).

The police officers were lawfully at the house pursuant to a search warrant, and they knew from their surveillance that Tate shared the house with McCoy. The locations where the firearms were found were all places where the officers could reasonably be expected to look for and find drugs and drug paraphernalia. The incriminating nature of the guns was apparent, because the officers had been informed that Tate had been convicted of felony drug and firearms offenses. Accordingly, the seizure of the firearms was justified under the plain view doctrine. *See United States v. Ewain*, 88 F.3d 689, 693 (9th Cir. 1996).

II. Upward Adjustment

Tate argues that the district court erred in ruling on the two-level upward adjustment for possession of three or more firearms pursuant to § 2K2.1(b)(1)(A) of the United States Sentencing Guidelines. Yet he admitted that he shared the residence with McCoy and acknowledged that he "frequented the home and stored the [two rifles] there." Also, after admitting that he owned the two rifles, Tate told the officers that he would admit possessing all five guns if the state lowered his bail and did not charge McCoy.

McCoy also told the police that the guns belonged to Tate. Although this evidence was hearsay, it may be used in sentencing if accompanied by "some minimal indicia of reliability." *United States v. Huckins*, 53 F.3d 276, 279 (9th Cir. 1995) (internal quotation marks omitted). Here, her statement was corroborated by Tate's willingness to accept responsibility for all five firearms and the presence of weapons that Tate admittedly owned – along with other items – at the house. This establishes sufficient indicia of reliability for McCoy's statement to have been relied on at sentencing.

Based on the foregoing, we hold that it was not clearly erroneous for the district court to apply a two-level upward adjustment to Tate's sentence.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ENTERED
Clerk, U.S. District Court
11-21-02
Central District of California
By /s/ (initials) Deputy

UNITED SATES OF AMERICA vs.

Defendant	Andrew Tate
akas:	See Attached
Residence Address	Metropolitan Detention Center 535 N. Alameda Street Los Angeles, CA 90012
Docket No.	CR 02-123-SVX
Social Security No.	553-19-5404
Mailing Address	Same

JUDGMENT AND PROBATION/ COMMITMENT ORDER

In the presence of the attorney for the government, the defendant appeared in person on this date.

Month	Day	Year
11	13	2002

COUNSEL	[X] **WITH COUNSEL** Frank Duncan, retained (Name of Counsel)
PLEA	[X] **GUILTY,** and the court being satisfied that there is a factual basis for the plea. [ ] **NOLO CONTENDRE** [ ] **NOT GUILTY**
FINDING	There being a finding/verdict of [X] **GUILTY,** defendant has been convicted as charged of the offense(s) of: Felon in Possession of Firearm in violation of 18 USC 922(g)(1) as charged in the Indictment.
JUDGMENT AND PROB/ COMM ORDER	The Court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the Court, the Court adjudged the defendant guilty as charged and convicted and ordered that: Pursuant to the Sentencing Reform Act of 1984, it is the judgment of the Court that the defendant is hereby committed to the custody of the Bureau of Prisons to be imprisoned for a term of: **One hundred ten (110) months** on the Single-Count Indictment.

Upon release from imprisonment, the defendant shall be placed on supervised release for a term of 3 years under the following items and conditions:

1. The defendant shall comply with the rules and regulations of the U.S. Probation Office and General Order 318;

2. The defendant shall participate in outpatient substance abuse treatment and submit to drug and alcohol testing, as instructed by the Probation Officer. The defendant shall abstain from using illicit drugs, using alcohol, and abusing prescription medications during the period of supervision; and

3. The defendant shall not obtain or possess any driver's license, Social Security number, birth certificate, passport or any other form of identification in any name, other than the defendant's true legal name, without the prior written approval of the Probation Officer; further, the defendant shall not use, for any purpose or in any manner, any name other than his true legal name.

Defendant's rights on appeal are explained.

In addition to the special conditions of supervision imposed above, it is hereby ordered that the Standard Conditions of Probation and Supervised Release within this judgment be imposed. The Court may change the conditions of supervision, reduce or extend the period of supervision and at any time during the supervision period or within the maximum period permitted by law, may issue a warrant and revoke supervision for a violation occurring during the supervision period.

☐ This is a direct commitment to the Bureau of Prisons, and the Court has NO OBJECTION should the Bureau of Prisons designate defendant to a Community Corrections Center.

11/18/02 — Date

/s/ Stephen V. Wilson
Stephen V. Wilson, U.S. District Judge

It is ordered that the Clerk deliver a copy of this Judgment and Probation/Commitment Order to the U.S. Marshal or other qualified officer.

Sherri R. Carter, Clerk

SEAL

NOV 20 2002 — Filed Date

By /s/ Paul M. Cruz,
Paul M. Cruz, Deputy Clerk

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall comply with the additional conditions on the attached page(s) pursuant to General Orders 318 and 01-05.

STATUTORY PROVISIONS PERTAINING TO PAYMENT AND COLLECTION OF FINANCIAL SANCTIONS

The defendant shall pay interest on a fine or restitution of more than $2,500, unless the court waives interest or unless the fine or restitution is paid in full before the fifteenth (15th) day after the date of the judgment pursuant to 18 U.S.C. §3612(f)(1). Payments may be subject to penalties for default and delinquency pursuant to 18 U.S.C. §3612(g). Interest and penalties pertaining to restitution, however, are not applicable for offenses completed prior to April 24, 1996.

If all or any portion of a fine or restitution ordered remains unpaid after the termination of supervision, the defendant shall pay the balance as directed by the United States Attorney's Office. 18 U.S.C. §3613.

The defendant shall notify the United States Attorney within thirty (30) days of any change in the defendant's mailing address or residence until all fines, restitution, costs, and special assessments are paid in full. 18 U.S.C. §3612(b)(1)(F).

The defendant shall notify the Court through the Probation Office, and notify the United States Attorney of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay a fine or restitution, as required by 18 U.S.C. §3664(k). The Court may also accept such notification from the government or the victim, and may, on its own motion or that of a party or the victim, adjust the manner of payment of a fine or restitution pursuant to 18 U.S.C. §3664(k). See also 18 U.S.C. §3572(d)(3) and for probation 18 U.S.C. §3563(a)(7).

Payments shall be applied in the following order:

1. Special assessments pursuant to 18 U.S.C. §3013;

2. Restitution, in this sequence:
   Private victims (individual and corporate)
   Providers of compensation to private victims,
   The United States as victim;

3. Fine;

4. Community restitution, pursuant to 18 U.S.C. §3663(c); and

5. Other penalties and costs.

SPECIAL CONDITIONS FOR PROBATION AND SUPERVISED RELEASE

As directed by the Probation Officer, the defendant shall provide to the Probation Officer: (1) a signed release authorizing credit report inquiries; (2) federal and state income tax returns or a signed release authorizing their disclosure and (3) an accurate financial statement, with supporting documentation as to all assets, income and expenses of the defendant. In addition, the defendant shall not apply for any loan or open any line of credit without prior approval of the Probation Officer.

The defendant shall maintain one personal checking account. All of defendant's income, "monetary gains," or other pecuniary proceeds shall be deposited into this account, which shall be used for payment of all personal expenses. Records of all other bank accounts, including any business accounts, shall be disclosed to the Probation Officer upon request.

The defendant shall not transfer, sell, give away, or otherwise convey any asset with a fair market value in excess of $500 without approval of the Probation Officer until all financial obligations imposed by the Court have bene satisfied in full.

STANDARD CONDITIONS OF PROBATION AND SUPERVISED RELEASE

While the defendant is on probation or supervised release pursuant to this judgment:

1. The defendant shall not commit another Federal, state or local crime;

2. the defendant shall not leave the judicial district without the written permission of the court or probation officer;

3. the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4. the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5. the defendant shall support his or her dependants and meet other family responsibilities;

6. the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

7. the defendant shall notify the probation officer within; 72 hours of any change in residence or employment;

8. the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9. the defendant shall not frequent places where controlled substances are illegally sold, used, distributed or administered;

10. the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11. the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12. the defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer';

13. the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14. as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to

make such notifications and to conform the defendant's compliance with such notification requirement;

15. the defendant shall not possess a firearm or other dangerous weapon;
16. the defendant shall, upon release from any period of custody, report to the probation officer within 72 hours.

These conditions are in additions to any other conditions imposed by this judgment.

RETURN

I have executed the within Judgment and Commitment as follows:

Defendant delivered on _____ _____

Defendant noted on appeal on _____

Defendant released on _____

Mandate issued on _____

Defendant's appeal determined on _____

Defendant delivered on _____ to _____

at _____

the institution designated by the Bureau of Prisons, with a certified copy of the within Judgment and Commitment.

United States Marshal

_____ By _____

Date Deputy Marshal

CERTIFICATE

I hereby attest and certify this date that the foregoing document is a full, true and correct copy of the original on file in my office, and in my legal custody.

Clerk, U.S. District Court

_____ By _____

Filed Date Deputy Clerk

APPENDIX C

C-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Aug 18 2004
Cathy A. Catterson, Clerk
U.S. Court of Appeals

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
ANDREW TATE,
Defendant - Appellant.

No. 02-50616

D.C. No. CR-02-00123-SVW
Central District of California
Los Angeles

ORDER

Before: BROWNING, RYMER, and GRABER,
Circuit Judges.

Appellant's Motion for Order to File Late Reply to Government's Opposition to Recall Mandate is GRANTED. Appellant's Motion to Recall Mandate and for Leave to File Petition for Rehearing Out-of-Time is DENIED.

(2)

Supreme Court, U.S.
FILED
OCT 27 2004
OFFICE OF THE CLERK

No. 04-548

In the Supreme Court of the United States

ANDREW TATE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

In the Supreme Court of the United States

No. 04-548

ANDREW TATE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
Acting Solicitor General

OCTOBER 2004

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* The government waives any further response to the petition unless this Court requests otherwise.